



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 172 50288 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a Form I-290B with additional comments.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is November 13, 1997. The beneficiary's salary as stated on the labor certification is \$11.55 per hour for a forty-hour workweek, which equates to \$24,024.00 per annum.¹

With its initial petition, the petitioner submitted a copy of its 1997, 1998, 1999 and 2000 tax returns.² The director determined that the evidence contained therein was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date, and therefore issued a request for evidence on July 22, 2002. The request for evidence required the petitioner to submit regularly sanctioned evidence, such as tax returns, annual reports, and/or audited financial statements to demonstrate that the petitioner had the ability to pay the beneficiary's salary at the time the priority date was established. The director also advised the petitioner that if applicable, a statement from a financial officer of the company stating that it employed more than 100 workers would be acceptable. Finally, the director requested evidence to corroborate the beneficiary's claims of previous work experience as set forth on the labor certificate.

¹ The director's calculation of the proffered wage as set forth in his decision is incorrect. Specifically, the director erroneously calculates the beneficiary's annual salary at \$21,792.00 based on an hourly wage of \$11.35 per hour, when in fact the correct wage is \$11.55 per hour.

² It is noted that the petitioner's tax year runs from August 1 to July 31.

In response to the request for evidence, counsel submitted a letter from the beneficiary's previous employer, and a duplicate copy of the 2000 tax return that was previously submitted. The director determined that the evidence in the record did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing thereafter because the petitioner's net income was less than the proffered wage. Consequently, the director denied the petition on November 29, 2002.

On December 31, 2002, counsel filed a Form I-290B with a brief statement contesting the director's findings. In addition, counsel requested an extension of sixty days to submit a brief and additional evidence. As of the date of this decision, no additional correspondence or supporting documentation has been received. Therefore, the AAO will review the director's decision based on the contents of the record.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets (lines 1-6 on Schedule L) and current liabilities (lines 16-18 on Schedule L). Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return.

The record contains a copy of the petitioner's federal tax returns for the years 1997, 1998, 1999, and 2000. The director reviewed the petitioner's net income and net current assets for each year, and determined that it did not have the financial ability to pay the beneficiary's proffered wage at the establishment of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO has reviewed the returns, and notes that the petitioner's income and assets are as follows:³

<u>Year</u>	<u>Net Income</u>	<u>Net Current Assets</u>
1997	\$ 0.00	(\$62,145.00)
1998	\$11,771.00	(\$18,158.00)
1999	\$ 1,858.00	(\$54,084.00)
2000	(\$6,408.00)	(\$ 1,698.00)

Since the proffered wage is \$24,024.00 per annum, the petitioner has neither sufficient net income nor net current assets to pay the beneficiary's proffered salary.

³ Please note that in calculating the petitioner's net income and net current assets, the AAO notes that several of the director's calculations as set forth in his decision are erroneous. The figures set forth above are accurate calculations.

In response to the director's request for evidence, the petitioner resubmitted a copy of the 2000 tax return already in the record. No additional financial documentation, such as annual reports, audited financial statements, or bank statements was submitted to establish the petitioner's ability to pay the proffered wage.

Since the record contained no financial evidence that established the petitioner's ability to pay the proposed salary during the relevant period, the director denied the petition. The AAO concurs with the director's findings.

On appeal, no brief or documentary evidence has been submitted for consideration. The only new assertions contained in the record are those of counsel as set forth on the Form I-290B. The AAO will address counsel's contentions, but advises that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel argues that it is "ludicrous and unreasonable" for CIS to deny the petition. Specifically, counsel states that the decision of the director was not based on prevalent accounting and tax regulation interpretations, and argues that CIS should have considered depreciation and amortization in its determination of the petitioner's ability to pay the proffered wage. The AAO disagrees. In *K.C.P. Food Co., Inc.*, 623 F. Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, *supra*.

Furthermore, counsel was put on notice of the deficiency of the financial evidence submitted with the initial petition, and was given a reasonable opportunity to provide additional evidence for the record before the visa petition was adjudicated. The regulatory requirements clearly state that the petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the continuing ability to pay until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). Counsel failed to submit sufficient evidence to satisfy the regulatory requirements, and failed to submit any new evidence for consideration on appeal. Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing thereafter.

Beyond the decision of the director, the AAO notes a potential discrepancy in the record with regard to the beneficiary's experience. Specifically, the experience letter submitted in response to the director's request for evidence is from "Avila's El Ranchito," which is identical to the petitioner named on the I-140 visa petition. Although the addresses of the petitioning employer and the previous employer differ, it appears that the two may be the same company or affiliated companies. If the companies are the same entity, the letter is unacceptable because the beneficiary may not obtain his qualifying experience with the same petitioning employer since the validity of the offer of employment would be questionable if the petitioning employer sponsored an employee already working with it rather than trying to find a U.S. worker. See *Salad Bowl Restaurants*, 90-INA-200 (BALCA 1991).

In addition, if the companies are affiliated, the beneficiary's claim of experience is also questionable since experience gained from one employer who had virtually identical shareholders and corporate officers of the petitioning employer has been construed as on-the-job experience for petitioning employers. See *Id.*; *Matter of*

Boulevard Cafe, 96-INA-33 (BALCA September 30, 1997). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In the event of any further proceedings in this matter, the petitioner is advised that the relationship between the petitioner and the previous employer must be clarified in order to properly determine that the beneficiary satisfies the minimum experience requirements for the position as set forth on the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.